

1 UNITED STATES BANKRUPTCY COURT

2 SOUTHERN DISTRICT OF NEW YORK

3 Case No. 08-99000-smb

4 Adv. Proc. No. 08-01789-smb

5 Adv. Proc. No. 10-05279-smb

6 - - - - - x

7 In the Matter of:

8 BERNARD L. MADOFF INVESTMENT SECURITIES, LLC., et al,

9 Debtor.

10 - - - - - x

11 SECURITIES INVESTOR PROTECTION CORPORATION,

12 Plaintiffs,

13 v.

14 BERNARD L. MADOFF INVESTMENT SECURITIES, LLC., et al,

15 Defendants.

16 - - - - - x

17 IRVING H. PICARD, ESQ., TRUSTEE FOR THE SUBSTANTIV,

18 Plaintiffs,

19 v.

20 MAGNIFY INC., et al,

21 Defendants.

22 - - - - - x

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1 U.S. Bankruptcy Court
2 One Bowling Green
3 New York, New York 10004-1408
4

5 January 31, 2018
6 10:06 AM
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9 B E F O R E :
10 HON STUART M. BERNSTEIN
11 U.S. BANKRUPTCY JUDGE
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1 HEARING RE: Motion to Dismiss Case.

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25 Transcribed by: Nicole Yawn, Jamie Gallagher, Penny Skaw

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1 P R O C E E D I N G S

2 THE COURT: Please be seated.

3 Good morning.

4 Picard v. Magnify?

5 MS. COLE: Good morning, Your Honor. Tracy Cole,
6 for the Trustee, from Baker Hostetler.

7 MS. TANNEY: Michelle Tanney, for the Trustee,
8 from Baker & Hostetler.

9 THE COURT: Very good.

10 MR. WEXELBAUM: Michael Wexelbaum, from Davidoff
11 Hutcher & Citron, for the defendants, Your Honor.

12 THE COURT: Oh.

13 MR. WEXELBAUM: I'm accompanied by Michael Katz.

14 THE COURT: How do you do? I'll hear your motion.

15 MR. WEXELBAUM: Thank you, Judge. Your Honor, let
16 me start by telling you what I plan to address during this
17 oral argument. And, of course, I'll be guided by the Court
18 as I go along. I intend to tell the Court very briefly the
19 nature of the motion and the relief we seek. I'm going to
20 touch on the standard of review, which I know Your Honor is
21 more than familiar with. I'll then get into what I'll refer
22 to as the elephant in the room, which is the Green affidavit
23 and its numerous exhibits. I'll then touch briefly on the
24 Trustee's new arguments and the Trustee's partnership claim,
25 which we deem to have been abandoned. And then I'll spend a

1 little bit more time on the Section 546(e) safe harbor
2 defense, as it applies to Premero and Strand, the actual
3 knowledge issue, which is probably the main issue before
4 Your Honor, and the willful blindness issue and then finish
5 up with the alter ego issue.

6 THE COURT: Well, that's a lot.

7 MR. WEXELBAUM: I understand.

8 THE COURT: It just struck me, in reading the
9 papers, that the principal issue is what did Green know and
10 when did he know it and whether the complaint alleges it.

11 MR. WEXELBAUM: I agree with that, Your Honor.

12 THE COURT: Right.

13 MR. WEXELBAUM: Let me respond to that right off
14 the bat.

15 THE COURT: Okay.

16 MR. WEXELBAUM: I think the entire argument that
17 Green knew about this fraud going back as far as 1989 is
18 based on an 11-word snippet from the testimony of Kurt
19 Brunner, the Swiss attorney who founded Magnify in 1983 at
20 the request of the Frenchman named Albert Igoïn, who was the
21 founder of Magnify and one of the founders of the Yeshaya
22 Horowitz Association, which we'll refer to as YHA, which was
23 the entity that made \$126 million of charitable
24 contributions and donations throughout Israel to
25 universities, hospitals, et cetera.

1 I don't think there can be any legitimate dispute
2 over the admissibility or the right for this Court to
3 consider the testimony of Kurt Brunner on the issue at hand
4 in its entirety. And that testimony is set forth on pages 7
5 through 11 of Mr. Brunner's -- I'm sorry -- of Mr. Green's
6 affidavit. The 11-word snippet that they quote in their
7 papers, Your Honor, in their brief, in their second amended
8 complaint is that Mr. Igoin introduced Mr. Green to
9 Mr. Brunner as, and I quote, "the person that then would
10 deal with the fate of Magnify." That's what they rely on to
11 say that Mr. Green took over that company in 1989.

12 I'm going to just read not four pages of this
13 testimony, but I'll read the highlights. So before he made
14 that statement, Mr. Brunner said, "Mr. Igoin was sort of
15 quite advanced in age. And in '83 in Zurich, he already
16 reflected on what would happen -- what should happen with
17 his money in case he died."

18 And then on 14 December, 1989, Mr. Igoin mentioned
19 it in more concrete terms. "And I understood the visit of
20 Mr. Igoin, that he wanted to introduce me -- introduce me to
21 -- introduce to me the person that would then deal with the
22 fate of Magnify."

23 THE COURT: Well, the question is what "then"
24 means, whether it means immediately or after Mr. Igoin dies.

25 MR. WEXELBAUM: Absolutely, Your Honor.

1 THE COURT: So it's ambiguous.

2 MR. WEXELBAUM: It's not ambiguous when you read
3 the rest of the testimony.

4 THE COURT: Right.

5 MR. WEXELBAUM: I'm going to move over to page 9,
6 where he says, "This document has been drafted by Mr. Green,
7 and it was given to me on 26 July, 1996 for me to sign. The
8 contents of this says that Magnify, Inc. transfers to
9 Mr. Green all authorizations, decisions regarding the monies
10 of Magnify to Madoff in New York." Then down below, he says
11 further to discuss -- this is a question. "Further to
12 discussions concerning management and supervision of the
13 monies of Magnify, which duties you undertook as of January
14 1995." That's Ms. Wang reading from the document.

15 And then she says in this letter -- "In the letter
16 you approved Mr. Green's appointment as supervisor of the
17 company's investment portfolio. Was there ever a supervisor
18 of the company's investment portfolio before this letter was
19 drafted?" Answer, "Before there was Mr. Igoins, who
20 monitored everything. I do now assume that he transferred
21 the shares to Horowitz and that he then continued some
22 duties as regards administration or the portfolio
23 investment."

24 When you say he -- this is a question.

25 THE COURT: He said, "But I assume this. I don't

1 know." So he's -- Brunner's really speculating.

2 Did Brunner testify at all? Did he have any
3 knowledge about the mechanics of when money was transferred
4 from Magnify to YHA? In other words, I've seen the
5 requests, and they're signed by different people. But that
6 doesn't necessarily tell me much.

7 MR. WEXELBAUM: Brunner played no part in that,
8 Your Honor.

9 THE COURT: All right, so he didn't know?

10 MR. WEXELBAUM: But he says, "When you say he
11 continued certain duties, do you mean Mr. Igoin, or do you
12 mean Mr. Green? I mean Mr. Igoin." Then a question. "Was
13 it your understanding that before this letter was issued,
14 that it was anybody's responsibility? It was Mr. Igoin's
15 responsibility? Well, it was Mr. Igoin's assets, and so, it
16 was his responsibility. That was my understanding."

17 THE COURT: Where is that?

18 MR. WEXELBAUM: Question -- "Okay. Before July
19 1996, Mr. Igoin never told you that he was -- that he was
20 setting investment policies with regard to Magnify's
21 portfolio in Madoff, did he? He did not, because he wanted
22 his money -- they wanted his money and not my money."

23 Question -- "I'm not understanding the because he
24 wanted his money and not my money." Answer -- "Mr. Igoin --
25 he managed his own money. It was his own money, so it was

1 not my money. So he didn't have to discuss it with me."

2 Question -- "Okay, so I understand. So before
3 July of 1996 then, if Magnify's investments with BLMIS are
4 being managed or supervised, they were the responsibility of
5 Mr. Igoin and then, after this letter, Brunner, Exhibit 20,
6 they had become the responsibility of Mr. Green; is that
7 right?" Answer -- "As far as I am concerned, this is
8 right."

9 THE COURT: But I don't know what kind of
10 agreements Mr. Green and Mr. Igoin had. And when I -- I
11 read this before, and, you know, he's testifying honestly,
12 but he just doesn't know whether the way -- the way that
13 they transacted is necessarily accurately reflected by the
14 documents we're talking about.

15 MR. WEXELBAUM: Well, Your Honor, I would say that
16 that testimony or our position regarding that testimony was
17 bolstered by the following. The fee agreement that is in
18 question only starts compensating Mr. Green starting in
19 1995, after Albert Igoin passed away.

20 THE COURT: Right.

21 MR. WEXELBAUM: Green was not named managing
22 director of Magnify until after Mr. Igoin passed away in
23 1995.

24 THE COURT: Well, maybe he thought he couldn't get
25 away with that before Mr. Igoin died.

1 MR. WEXELBAUM: Get away with what, Your Honor?

2 He --

3 THE COURT: Collecting a fee dating back to 1995,
4 although the agreement was signed in 1997 and formally
5 taking over the management of Magnify.

6 MR. WEXELBAUM: He took over the management of
7 Magnify --

8 THE COURT: You know, you know, what I'm trying to
9 point out is you're arguing about inferences to be drawn
10 from the evidence bolstered by the affidavits. I understand
11 your argument that I can consider this, and I agree with
12 you. I can consider the entire transcript, because the
13 Trustee referred to part of it. But on the motion to
14 dismiss, where I draw all inferences in favor of the non-
15 moving party, the statements are equivocal. That's all.

16 MR. WEXELBAUM: I think the -- you know, the --

17 THE COURT: I'm not going to resolve it on the
18 motion to dismiss, not based on this testimony.

19 MR. WEXELBAUM: Well, there are also the letters
20 of instruction from Green to Madoff regarding the Magnify
21 BLMIS accounts did not begin until after Igoins died in 1995.
22 All of this additional evidence -- certainly, the --

23 THE COURT: But that's -- see, that's the point.
24 It's evidence. You're giving me evidence in a motion to
25 dismiss. I'm not going to treat this as a motion for

1 summary judgment. So let's look at the allegations in the
2 complaint to start, because you don't even have to look at
3 this if the allegations in the complaint are insufficient,
4 right?

5 MR. WEXELBAUM: Correct.

6 THE COURT: Or are you saying that the allegations
7 are sufficient, but when you match them against the
8 documents you provided and Mr. Green's affidavit, that
9 they're not sufficient or they contradict it? Which is it?

10 MR. WEXELBAUM: Our position is if you disregarded
11 all of the other exhibits, the complaint is still
12 insufficient.

13 THE COURT: Okay, so let's go to the complaint.
14 The complaint alleges, starting in paragraph 53, that Green
15 filed the registration papers for YHA and opened the account
16 for YHA in 1998. It also says he held himself out as the
17 co-founder of YHA, who, "guided the organization's
18 activities and contributed significant sums for scientific,
19 medical research to Israel." Where did that come from?

20 Ms. Cole, where did that quote come from?

21 MS. COLE: It is a (indiscernible).

22 MR. MCMILLAN: Your Honor, I can't remember off
23 the top of my head, but I know that there are some publicly-
24 filed documents, and the Israeli Registrar has files. It
25 may have been both -- there may have been documents

1 exchanged during discovery, but that's it.

2 THE COURT: So you're saying Green said that, as
3 opposed to him saying it about YHA or Magnify?

4 MR. MCMILLAN: I think the allegation is that he
5 held himself out publicly as the guiding force.

6 THE COURT: That's somewhat conclusory. I'm just
7 -- because you have a quote, I'm asking you where the quote
8 came from and whether the quote pertains to something Green
9 was saying about himself or he was saying about YHA or
10 Magnify. Because certainly, Green didn't contribute
11 significant sums.

12 MR. WEXELBAUM: Your Honor, if I may interject?
13 And the founding documents of YHA clearly name seven
14 founders, of which Mr. Green is not one of them.

15 THE COURT: No, no, I know that.

16 MS. COLE: Your Honor, these are in documents that
17 were in the file to the Israeli Registrar, and they are
18 statements by YHA. It's what YHA said about Green.

19 THE COURT: So it's not what Green said?

20 MS. COLE: It's -- my understanding is it's what
21 YHA said about Green.

22 THE COURT: All right. So we disregard that
23 allegation.

24 MR. WEXELBAUM: And I don't agree with that. I
25 don't think there's anything that says YHA or Green ever

1 made any statement like that. He was their attorney,
2 nothing more.

3 THE COURT: Well, now they're saying Green didn't
4 make that statement. It was YHA. So what difference does
5 it make?

6 MR. WEXELBAUM: Okay.

7 (Pause)

8 THE COURT: Okay. Then paragraph 56 refers to
9 this meeting, on December 14th, 1989, where Igoin introduces
10 Green to Brunner as, quote, "the person that then would deal
11 with the fate of Magnify." And I understand when you're
12 talking about "then", whether it refers to immediately or to
13 after Igoin passes away. I've seen, you know, the portions
14 of the transcript you read. And I just think that it could
15 be any -- you know, they're ambiguous.

16 MR. WEXELBAUM: I respectfully disagree with that.

17 THE COURT: Okay.

18 MR. WEXELBAUM: But I understand, Your Honor.

19 THE COURT: All right. There's this thing about
20 transferring ownership of Magnify to YHA. I looked at the
21 documents, and that does not appear to be what occurred.
22 They were transferred in trust for the benefit of Mr. --
23 primarily, for the benefit of Mr. Igoin's wife and niece
24 and, I guess, his daughter and granddaughter.

25 MS. COLE: The actual document of assignment of

1 transfer is simply an assignment of transfer with all the
2 rights thereto. It's an actual assignment with no
3 limitations.

4 THE COURT: I didn't see that.

5 Was that one of your exhibits, Mr. Wexelbaum?

6 MR. WEXELBAUM: Yes.

7 THE COURT: Which exhibit was that?

8 MS. COLE: It is --

9 THE COURT: Since there are references to it being
10 held in -- other certain documents.

11 MR. WEXELBAUM: There was a group of documents,
12 and they clearly said in trust.

13 THE COURT: It was the assignment, though.

14 MS. COLE: Well, --

15 THE COURT: And that's all they're referring to is
16 the assignment.

17 MS. COLE: There is an actual assignment that is
18 without any limitations. There is a document that -- I'm
19 looking at the actual exhibit. I'm looking for the --

20 THE COURT: Mr. Wexelbaum, is it attached to your
21 papers?

22 MS. COLE: Right.

23 MR. WEXELBAUM: What document did Ms. Cole
24 mention? I'm sorry.

25 MS. COLE: The actual -- the actual assignment.

1 Here, let me look at my list of exhibits.

2 THE COURT: Which exhibit?

3 MR. WEXELBAUM: Exhibit V, Your Honor, V, as in
4 Victor.

5 THE COURT: V?

6 MR. WEXELBAUM: V, as in Victor.

7 MS. COLE: V, as in Victor.

8 THE COURT: Let me see what V is.

9 MS. COLE: Okay, so there were board minutes and a
10 cover letter.

11 THE COURT: That's the board minutes.

12 MS. COLE: Right, and I believe the board minutes
13 -- there is a reference to the words in trust that appear in
14 the board minutes. They do not appear in the assignment.

15 THE COURT: The letter from Brunner just says that
16 these shares are being transferred. I'm going to hand it
17 over. Are transferred to YHA.

18 MS. COLE: Okay.

19 THE COURT: It doesn't say in trust.

20 MS. COLE: It doesn't say in trust. The transfer
21 itself doesn't say in trust.

22 THE COURT: Is the transfer in this exhibit?

23 MS. COLE: Yes.

24 THE COURT: Where is the transfer? What's the
25 document number at the bottom of it, if you have it? You

1 have to take it out.

2 (Pause)

3 THE COURT: Found it. It says, you know, -- it
4 does say -- I'm looking at the document with the numbers
5 Brunner 0058 at the bottom. And I don't know if this is the
6 transfer or not, but it does say that the transferring --
7 Magnify is transferring two certificates with all rights
8 represented by these two certificates to YHA.

9 MS. COLE: Correct. And if Your Honor is inclined
10 to consider the Brunner deposition, we're happy to provide
11 it as he was asked about those documents and an
12 understanding about those documents.

13 THE COURT: Well, you know, do you disagree --
14 you've quoted a portion of the Brunner deposition without
15 attribution, by the way.

16 MS. COLE: Oh, we -- right, we --

17 THE COURT: So the question is do you disagree
18 that I can consider the whole document.

19 MS. COLE: Your Honor, it's not about whether you
20 can or cannot consider the document. The threshold question
21 is what is the purpose for which the document is being
22 offered. And our belief is that the document is being
23 offered to challenge our inferences, as Your Honor
24 indicated. In the testimony he says other things.

25 And so, he -- defendant is saying you shouldn't

1 infer what the Trustee is saying you should infer.

2 THE COURT: Well, suppose you --

3 MS. COLE: You should infer what I say. And
4 you're absolutely right, Your Honor. I don't mean to
5 interrupt you. If -- go on.

6 THE COURT: I was going to say suppose he said in
7 another part of the deposition when I said "then", I meant
8 when Igoiin dies and not now?

9 MS. COLE: Exactly right. And that's if it did
10 say that, of course, Your Honor would be entitled to review
11 it.

12 THE COURT: Look.

13 MS. COLE: So I'm happy to provide the deposition.
14 I should say that the -- when he said the entirety of the
15 issue, it's a two-day deposition. And we go back to the
16 issue a few times. So there's a lot of written testimony
17 about it.

18 THE COURT: Well, --

19 MS. COLE: It is not contradicted that if you -- I
20 believe if you read what he quoted, --

21 THE COURT: Yeah, I agree that you seem to pick
22 the best parts out, Mr. Wexelbaum. And I read it, and, you
23 know, it's really -- it just raises disputed issues of fact.
24 I'm not even sure that I would grant a motion for summary
25 judgment, based on this testimony, let alone a motion to

1 dismiss.

2 MS. COLE: And --

3 THE COURT: Just I'm talking about the Brunner
4 deposition now. The parts you've given me -- they're just
5 -- they're equivocal, for the reasons I've said.

6 MR. WEXELBAUM: As I said, I respectfully
7 disagree.

8 THE COURT: But let me go along with the --

9 MR. WEXELBAUM: Your Honor, I just want to point
10 out Exhibits W, X, and --

11 THE COURT: X? WX?

12 MR. WEXELBAUM: After Exhibit V, there's Exhibit
13 W, and there's Exhibit X.

14 THE COURT: Right.

15 MR. WEXELBAUM: And they clearly refer to this
16 being the trust.

17 THE COURT: I saw that. I have no question about
18 it. I saw that, but that's -- they didn't rely on that.
19 And there is a question of fact, apparently, as to whether
20 or not the transfer was outright or was in trust, pursuant
21 to what -- and I don't have the deed of trust here.

22 MR. WEXELBAUM: As I assume you know, the deed of
23 trust was stolen, and we --

24 THE COURT: I didn't know that, no.

25 MR. WEXELBAUM: Oh, well, one of the documents

1 that we produced and we admitted it was not something that
2 should be attributable to the second amended complaint. But
3 we gave it by way of background to confirm the theft of the
4 office safe in Mr. Green's office in --

5 THE COURT: Oh, I saw that. I didn't understand
6 why that was in there. But --

7 MR. WEXELBAUM: Because the deed of trust was in
8 there.

9 THE COURT: Okay.

10 MR. WEXELBAUM: We did produce the three
11 amendments to the deed of trust, clearly indicating it was a
12 trust arrangement.

13 THE COURT: I saw that. It's inconsistent with
14 the -- what has been represented to me to be the assignment.
15 So to the extent it's relevant, it's just a question of
16 fact. They say it was an outright assignment, and, you
17 know, the assignment seems to support that.

18 MR. WEXELBAUM: Well, even if you find that, Your
19 Honor, how does that impute actual knowledge to Mr. Green?
20 It doesn't.

21 THE COURT: Okay, fair enough. I'm going to ask
22 them what are the specific allegations that attribute actual
23 knowledge. Do you contest that, after 1995, when he took
24 over the management of these accounts, he had actual
25 knowledge of the transactions?

1 MR. WEXELBAUM: Of the transactions? He had no
2 actual knowledge that there was a Ponzi scheme being
3 conducted.

4 THE COURT: Well, they're going to argue that he
5 knew, based on the fact, you know, in terms of what was
6 deposited and what was taken out, that no rational person --
7 I don't want to make this sound like an objective test. But
8 that no rational person could think that this was a
9 legitimate scheme.

10 MR. WEXELBAUM: I disagree with that, Your Honor.
11 When Mr. Green took over in 1995, from then until 2008, when
12 the fraud came to light, on the Magnify account, which is
13 the big account, the gains in that account never, ever
14 exceeded 10 percent per annum. And there were even years
15 where it lost money. So there were no exorbitant rates of
16 return. There were no consistent rates of return.

17 THE COURT: But how can you tell they're losing
18 money when they're not getting customer statements and
19 they're drawing all of this money out? How did you keep
20 track?

21 MR. WEXELBAUM: He keeps track by the amount on
22 the portfolio evaluations, semi-annually, and then taking
23 into account what was withdrawn from the account and given
24 to Yeshaya. Because the monies came out of Magnify and went
25 to Yeshaya for the charitable contributions.

1 THE COURT: Okay, well, let me say this. I'm
2 looking at your Exhibit J, which is the Magnify 2 account.
3 It looks like Green starts to get these portfolio
4 evaluations dated as of June 30th, 1997. Do you see that?

5 MR. WEXELBAUM: That was the first ones that were
6 addressed to him.

7 THE COURT: Addressed to him? So --

8 MR. WEXELBAUM: Yes.

9 THE COURT: -- giving him the benefit of the
10 doubt, that's when he started to get them. And it shows
11 total equity of \$482 million, right?

12 MR. WEXELBAUM: It does.

13 THE COURT: If you go to the -- what I assume is
14 the last -- the last one of June 30th, '08, which is the
15 last document in that exhibit, it shows total equity of \$768
16 million. And in addition, if you go back and look at the
17 Trustee's chart of withdrawals during that same period, he
18 withdrew \$74 million. So if you add that back in, the
19 account is worth \$840 million. So it goes from 480 to 840
20 million in 11 years?

21 MR. WEXELBAUM: Your Honor?

22 THE COURT: That's pretty good.

23 MR. WEXELBAUM: On page 17 in footnote 7 of
24 Mr. Green's affidavit, we deal with this issue. And we did
25 it -- we did it from January 1995, which is when Mr. Igo

1 died. And we point out that, in January 1995, based on the
2 123194 statement, the equity in that account was \$428
3 million and change -- in the two accounts. I'm sorry.

4 THE COURT: Right.

5 MR. WEXELBAUM: 31 million in this first account
6 and 397 in the second. We then point out that, at the end
7 of the period, the Magnify 2 account had \$768 million.

8 THE COURT: What's the end of the period?

9 MR. WEXELBAUM: I'm sorry. Right before the June
10 of '95 -- of '98, I believe.

11 THE COURT: Correct.

12 MR. WEXELBAUM: \$31 million in the Magnify account
13 had grown to -- in the first account, there was \$1,145,000
14 in the Magnify 1 account and \$768 million in the Magnify 2
15 account. We then, in footnote 7, added in \$119 million in
16 withdrawals or transfers that came from the Trustee's
17 notices of determination of claim on the two Magnify
18 accounts. That means that, over that period -- and that is
19 from June -- I'm sorry -- December '94 to June of 2008.
20 It's almost a 14-year period.

21 The growth went from \$428 million to approximately
22 \$888 million. That is not an outlandish appreciation over a
23 14-year period. It averages less than 10 percent a year,
24 Your Honor.

25 THE COURT: Well, he can make that argument.

1 That's a question of fact, though, isn't it, really?

2 MR. WEXELBAUM: But it doesn't impute that he has
3 actual knowledge that there's a fraud going on. The account
4 was going up at 10 percent or less a year. How does that
5 give him knowledge of fraud?

6 THE COURT: But you're arguing -- you're arguing
7 the merits. Couldn't I draw a reasonable inference that he
8 knew, based upon the fact that it always went up, never went
9 down and appeared to be an ATM on steroids that he didn't
10 know that, you know, there was no reality to the trading? I
11 mean, it's not just that.

12 He wasn't getting statements in the account. He
13 was getting targeted returns. One of the documents -- a
14 couple of documents you included show that.

15 MR. WEXELBAUM: I'm not sure what you mean by
16 targeted returns.

17 THE COURT: Okay. Talk about the Premero account,
18 where he splits it. Let me go back to that letter. He
19 writes a letter. This is your Exhibit N.

20 MR. WEXELBAUM: Nancy?

21 THE COURT: Yeah, Nancy. First of all, one of the
22 Trustee's allegations is he was getting drafts of these
23 portfolio evaluations, meeting with Madoff and DiPascali,
24 doing whatever they were doing to ensure that the returns
25 hit a target. And then he was getting a final version,

1 right?

2 So this March 18th, 1996 letter, which Green is
3 writing to Madoff, says, "Thank you for giving me a
4 portfolio evaluation at our February 26th, 1996 meeting."
5 Where is that portfolio evaluation? All of the portfolio
6 evaluations that you've given me are dated as of June 30th
7 or as of December 31st.

8 So at any rate, --

9 MR. WEXELBAUM: The meeting was on February 26th,
10 Your Honor.

11 THE COURT: And he was given a portfolio
12 evaluation at that meeting, right?

13 MR. WEXELBAUM: No, it would have been for the --

14 THE COURT: That's what it said. Well, --

15 MR. WEXELBAUM: -- end of the prior year.

16 THE COURT: -- that's what you say. I don't know
17 that, but let me go on. He says, "I want you to split the
18 accounts." He wants the accounts to generate the same rate,
19 which is very prescient, which he hopes will be 20 percent.
20 And then he says at the end of March, on March 28th, "Please
21 transfer any sum over \$500,000 to the Premero 2 account."

22 Not from the Premero 2 account, to a bank account,
23 right? So as of --

24 MR. WEXELBAUM: Correct.

25 THE COURT: -- the end of March, you would think

1 the Premero 2 account has \$500,000, because he's transferred
2 the excess out, right?

3 MR. WEXELBAUM: Correct.

4 THE COURT: Okay. So then you go to the Premero 2
5 account, the statement as of June, 3 months later. And the
6 Premero 2 account has \$525,000, which increased in value at
7 the rate of 5 percent or at an annual rate of 20 percent,
8 which is exactly what they're talking about in the letter.
9 Doesn't that make the Trustee's case?

10 MR. WEXELBAUM: No, Your Honor. I hope that the
11 proceeds will exceed 20 percent per annum is a hope and a
12 prayer. It's wishful thinking. It's not an agreement.

13 THE COURT: But it's exactly 20 percent, almost to
14 the penny.

15 MR. WEXELBAUM: That may be on that one statement.
16 I'd have to look at that. But the others are not.

17 THE COURT: Okay, but on that one statement, --
18 where are those -- doesn't that make the Trustee's case is
19 my point.

20 MR. WEXELBAUM: Can I just take a look at the
21 statement you're referring to? What exhibit --

22 THE COURT: It's Exhibit M, the first statement --
23 Exhibit M, which is the first statement of the Premero 2
24 account.

25 (Pause)

1 MR. WEXELBAUM: And what was the date of the
2 letter?

3 (Pause)

4 MR. WEXELBAUM: For that one statement, Your
5 Honor, I don't disagree with you.

6 THE COURT: All right. You know, but I tied it
7 together with the letter, and it does support the inference
8 that, one, he expected to get the same returns in both
9 accounts. I don't know how he could do that. And, two,
10 that the return he hoped was exactly the return he got,
11 almost to the penny.

12 MR. WEXELBAUM: For that one period, but not for
13 the others, if you compared the statements. It was not a
14 regular rate of return, and it rarely came up anywhere close
15 to 20 percent.

16 THE COURT: And did the estate -- did they ever
17 lose money from month-to-month?

18 MR. WEXELBAUM: I know in the Magnify -- I can't
19 say month-to-month. He got semi-annual portfolio
20 evaluations. That was a procedure that was in effect
21 through Mr. Igoin, and he continued it. Mr. Green continued
22 it. So he didn't get monthly statements, Judge.

23 THE COURT: I didn't see any statements, any of
24 these portfolio evaluations, prior to Mr. Igoin's death.
25 Were there others?

1 MR. WEXELBAUM: From Magnify, he had -- well,
2 first of all, the accounts weren't created 'til after
3 Mr. Igoin died, for Premero.

4 THE COURT: Well, but Magnify was getting
5 statements at some point, wasn't it?

6 MR. WEXELBAUM: It was.

7 THE COURT: When did it stop getting statements?

8 MR. WEXELBAUM: It never -- I don't know, because
9 we never -- Mr. Green never saw those. We were not privy to
10 those.

11 THE COURT: But you also represent Magnify, right?

12 MR. WEXELBAUM: Correct.

13 THE COURT: Right.

14 MR. WEXELBAUM: But the first statements we
15 produced were in '92. Because in 1993, Mr. Igoin, for the
16 first time, showed Mr. Green what was in the Magnify
17 accounts. So he did have the '92 statements.

18 THE COURT: Okay, but there were statements --
19 it's --

20 MR. WEXELBAUM: The portfolio evaluations, not the
21 statements.

22 THE COURT: I saw a statement -- a screen shot of
23 one of the statements, the first statement, I guess, for --

24 MR. WEXELBAUM: That's in 1990, I believe. That's
25 --

1 THE COURT: Yeah, by the way, I'll ask you. I
2 don't understand how to read this statement, but okay. But
3 there were clearly monthly statements. When did they stop?
4 When did they stop?

5 MR. WEXELBAUM: According to the Trustee, they
6 stopped some time in the early 1990s, before Mr. Green was
7 involved.

8 THE COURT: Well, they said he was involved since
9 1989.

10 MR. WEXELBAUM: I understand that, Your Honor, but
11 the credible interpretation of Mr. Brunner's testimony and
12 the documentary evidence clearly indicates that was not the
13 case.

14 THE COURT: I would not consider Green's testimony
15 on a motion to dismiss. I may consider documents which are
16 attached to his declaration, but -- or his affidavit. But I
17 wouldn't --

18 MR. WEXELBAUM: Well, I referred to the documents
19 already that we say support that.

20 THE COURT: And I would only consider the
21 documents either that the Trustee relied on or that -- well,
22 that the Trustee relied on or incorporated by reference or
23 referred to as --

24 MR. WEXELBAUM: All right.

25 THE COURT: There may be documents that the

1 Trustee has, but the Trustee doesn't rely on them in
2 drafting the complaint. I don't think I consider those.

3 MR. WEXELBAUM: Well, if they completely
4 contradict the Trustee's theory of the case and they give
5 the lie to what the Trustee is saying and the case law says
6 that that is also something that you would consider on a
7 motion to dismiss.

8 THE COURT: Yeah, I haven't seen any blatant
9 contradictions in the documents. And again, this is not the
10 trial. This is --

11 MR. WEXELBAUM: I understand that.

12 THE COURT: This is a motion to dismiss a
13 complaint. Oh, I was going back to the allegations in the
14 complaint. Paragraph 59 alleges Green represented himself
15 at all times, both privately and publicly, as controlling
16 YHA's donations, which is described further below. All
17 originate from transfers from Magnify's accounts to YHA's
18 account. So why doesn't that allegation --

19 MR. WEXELBAUM: It's a completely conclusory
20 allegation. There's no basis to that. He was not one of
21 the directors or Trustees or managers of YHA. He was its
22 attorney.

23 THE COURT: It's not always easy to distinguish
24 between a specific allegation of fact and a conclusory
25 allegation. And maybe it depends on the degree of

1 specificity.

2 MR. WEXELBAUM: But there should be some
3 evidentiary support for it. It can't just be a conclusion.
4 And that's just a conclusion.

5 THE COURT: Well, I agree with you that conclusory
6 allegations aren't entitled to be credited. But at some --
7 the Trustee alleges he held himself out as the person who
8 controls the donations from YHA.

9 MR. WEXELBAUM: Based on what, Your Honor?
10 There's not a --

11 THE COURT: Well, why do they have to plead that?

12 MR. WEXELBAUM: Because it's a conclusory
13 allegation. You can't make a complaint up out of whole
14 cloth. You can't just make up a story. There has to be --

15 THE COURT: Suppose he's --

16 MR. WEXELBAUM: -- some evidentiary basis for it.
17 They have all of the records of BLMIS.

18 THE COURT: To prove it, yes, there has to be an
19 evidentiary basis. But for purposes of pleadings, suppose
20 the complaint said that Green told his brother that he
21 controls the donations. Would that be specifically
22 specific?

23 MR. WEXELBAUM: If they refer to specific
24 conversations between Green and his brother, yes. If they
25 just make it as a naked statement, no.

1 THE COURT: All right. I'm not saying it's an
2 easy line to draw, but, you know, on a -- at the stage of a
3 motion to dismiss, I don't know if you're right.

4 Then it says -- paragraph 62, "Beginning in the
5 early 1990s, Green began meeting with Madoff personally two
6 or three times per year to discuss Magnify's and Premero's
7 and Strand's accounts." Why would he be meeting with Madoff
8 to discuss the Magnify accounts --

9 MR. WEXELBAUM: He never did --

10 THE COURT: -- if he wasn't controlling them?

11 MR. WEXELBAUM: Because he never did, until after
12 Mr. Igo in passed away.

13 THE COURT: But that's not what this says.

14 MR. WEXELBAUM: That's a false allegation. And
15 Mr. Green was not even in the United States from 1986 to
16 1993. He met Mr. Madoff once in 1993 on a brief social
17 occasion. Met him once in 1994 at a brief social occasion.
18 No business was discussed.

19 When Mr. Igo in died, he instituted the procedure
20 of sending a letter to Mr. Madoff requesting a meeting.
21 Those letters start after Mr. Igo in passed away, and they --

22 THE COURT: But you're arguing --

23 MR. WEXELBAUM: -- already know that.

24 THE COURT: You're arguing the merits of the case.
25 And by the way, I happen to know, from other cases, not that

1 this is relevant, that Madoff met with Igoins daughter in
2 France to set up her account. So, you know, there were
3 meetings outside the United States.

4 MR. WEXELBAUM: Mr. --

5 THE COURT: All I'm saying is you're just --
6 you're arguing about what the evidence will show.

7 MR. WEXELBAUM: They can't just conclusorily say
8 that he met with Madoff prior to Igoins death and discussed
9 the Magnify accounts when there's no basis in fact for that.

10 THE COURT: You know, it sounds like you're
11 arguing a motion for sanctions, not a motion to dismiss.
12 You're saying that, when the Trustee drafted this complaint,
13 the Trustee had no reasonable basis, after investigation, to
14 make these allegations.

15 MR. WEXELBAUM: I happen to do believe that, Your
16 Honor.

17 THE COURT: Okay. But I'm not deciding that.

18 MR. WEXELBAUM: I understand.

19 THE COURT: I am deciding a motion to dismiss, and
20 I'm looking at the allegations in the complaint. And I'm
21 not going to consider whether or not there's contrary
22 evidence which should have led him to make another
23 allegation.

24 MR. WEXELBAUM: But they can't just make
25 conclusory statements and they become facts for purposes of

1 Your Honor's consideration. In the cases where you found
2 there to be actual knowledge, Shapiro, Avellino, Mendelow,
3 Kingate (ph), there was absolutely something that went on
4 that was documented. The Schupt process, in two of the
5 cases, --

6 THE COURT: Schupt.

7 MR. WEXELBAUM: Schupt? Sorry. Schupt process in
8 two of the cases --

9 THE COURT: I think that's what they meant. But
10 it was -- they called it a Schupt. They called it the
11 Schupt's process.

12 MR. WEXELBAUM: Yeah. In the Shapiro case, the
13 recreating phony trades --

14 THE COURT: Well, certainly, in those cases, well,
15 --

16 MR. WEXELBAUM: I mean, that doesn't exist in this
17 case, Your Honor. And then in the two cases where you found
18 there to be no actual knowledge that we cited, which was --
19 excuse me -- Merkin (ph) and Legacy -- these people knew
20 that there were impossible trade information, that there
21 were one questionable or wrongful or suspicious activity
22 after another. And yet, Your Honor concluded there was
23 nothing there that said they had actual knowledge. It's a
24 very, very, very high standard.

25 THE COURT: I agree with you. This is not --

1 first of all, every case is different.

2 MR. WEXELBAUM: Of course.

3 THE COURT: And I agree with you that where a
4 defendant actually participated with BLMIS in the creation
5 of fictitious trading records, that that's a stronger case.
6 But it doesn't necessarily mean that I couldn't infer that,
7 when -- assuming everybody knows that when \$5 million is
8 invested in an account, \$150 million is pulled out over
9 whatever the period of time is and another \$820 million is
10 still supposed to be in all of these accounts, that somebody
11 doesn't know that there is just something not right with
12 this.

13 MR. WEXELBAUM: Your Honor, when he took over,
14 there was 450 million in the accounts. At the end, it was
15 888 million in the accounts. And that is a 10 percent or
16 less return annually. There's nothing wrong or suspicious
17 about that. How does that give you actual knowledge that
18 this maniac, Mr. Madoff, is not actually trading securities?

19 THE COURT: One of the allegations in the
20 complaint is that, by September 1990, Green was the active
21 person in the Magnify accounts. And they produced -- or
22 they alleged, by reference to a September 1990 opening
23 statement for Magnify 2, that 2 trades in 1986 were
24 attributed to that account and that subsequent trades for
25 about 120 million of that same stock, again, before the

1 account opened, were attributed to that account.

2 MR. WEXELBAUM: That's right, Your Honor.

3 THE COURT: And if --

4 MR. WEXELBAUM: I'm sorry.

5 THE COURT: If I accept the allegations for the
6 purposes of the pleading that Green knew all this, wouldn't
7 that indicate to him that there was no legitimate trading?

8 MR. WEXELBAUM: Your Honor, that's the point.
9 This is the one thing that they're trying to impute to
10 Mr. Green that they have no basis to do. That statement
11 that you're looking at -- they redacted the name and address
12 on it, but I don't think --

13 THE COURT: No, it's here. It's Magnify, Kurt
14 Brunner, attorney at law. I'm sorry.

15 MR. WEXELBAUM: The one I have had --

16 THE COURT: I'm looking at paragraph 82 in the
17 pleading.

18 MR. WEXELBAUM: Oh, okay. The document itself had
19 the address redacted. It was not addressed to Mr. Green.
20 Mr. Green never saw that document until it was produced in
21 this litigation.

22 He had nothing to do with the MCI stock
23 transaction. The MCI stock transaction is something that
24 will have to be hashed out at trial, because it impacts the
25 very first claim in so far as Magnify's net equity is

1 concerned. But it's entirely conceivable, possible, maybe
2 even probable that Mr. Igoine, a very wealthy investor -- and
3 you're obviously aware of the monies he had invested in his
4 family's name. I think he also had banks that were invested
5 with Mr. Madoff.

6 But he had a holding that he bought in 1986 of MCI
7 stock at \$6.00 and change a share, that he gave that stock
8 to Mr. Madoff in 1990 and said, "Open a new Magnify account
9 with this money."

10 THE COURT: But none of this is pleaded.

11 MR. WEXELBAUM: But the point is, Your Honor,
12 their theory of the case is that Madoff gave Igoine and/or
13 Magnify \$120 million gift. Maybe that's the case, but I
14 find that to be a very implausible --

15 THE COURT: Why? They were giving gifts to YHA
16 throughout the years.

17 MR. WEXELBAUM: No, no, no, Magnify was giving
18 charitable contributions money to YHA. But Mr. Madoff,
19 according to this theory of the case, just created the
20 second Magnify account out of thin air with \$120 million.
21 That means he gave Magnify \$120 million. I don't find that
22 plausible.

23 THE COURT: So where did the \$120 million come
24 from?

25 MR. WEXELBAUM: Say that again.

1 THE COURT: Where did the \$120 million come from
2 to seed the account?

3 MR. WEXELBAUM: I don't know. My conjecture is
4 that Mr. Igoine had MCI stock that he bought in 1986, gave it
5 to Madoff in 1990 when it had gone up 7-fold and said, "Open
6 this account with this stock." It's just like a cash
7 deposit. It's a security deposit to open an account.

8 I don't know that. That's my conjecture, Your
9 Honor. But Mr. Green had absolutely nothing to do with that
10 and had no knowledge of that. And they can't just say he
11 did. They have to show he did with some evidence.

12 THE COURT: Right, they have to allege facts --

13 MR. WEXELBAUM: Plausibly allege.

14 THE COURT: They have to allege facts --

15 MR. WEXELBAUM: Correct.

16 THE COURT: -- that imply that he knew this.

17 MR. WEXELBAUM: Non-conclusory facts, Judge.

18 THE COURT: Conclusions when there's facts.

19 All right. Let me hear from the Trustee.

20 I don't mean to cut you off, but, you know, I've
21 read all the papers and got it.

22 So tell me where you plead, at least prior to
23 1995, Green's knowledge of the various transactions which
24 are supposed to imply that he had actual knowledge or at
25 least that he was highly suspicious or that he knew there

1 was a high probability that there was no actual trading in
2 these -- in these accounts.

3 MS. COLE: Sure, Your Honor. Let me start with
4 his control of Magnify, right, the allegations that he was
5 the person who was in charge of Magnify at the time.

6 THE COURT: Right, he was that (ph).

7 MS. COLE: Right. So if you look at paragraph 56,
8 --

9 THE COURT: Right.

10 MS. COLE: -- of the complaint, Brunner prepared
11 board minutes, an assignment of transfer transferring
12 ownership of Magnify to YHA by delivering Magnify bearer
13 shares to Green. That same day, Green used his authority to
14 open an account for Magnify at Bank Hapoalim in Jerusalem.
15 After that meeting, Brunner received no further contact from
16 Igoon on any matter and dealt only with Green concerning
17 Magnify. That's all in paragraph 56.

18 So 1989 forward, the only person to direct Brunner
19 was Green. Green authored all corporate resolutions entered
20 by Brunner from the time Brunner assumed control --

21 THE COURT: Where are you reading from?

22 MS. COLE: And that's paragraph 56 and 121.

23 THE COURT: 121?

24 MS. COLE: 121.

25 (Pause)

1 THE COURT: Okay.

2 MS. COLE: Okay? And to the extent it's helpful
3 to Your Honor, in the testimony that -- the snippet of the
4 Brunner testimony that the defendants submitted on page 93,
5 Brunner goes on to say, at the bottom of 93, --

6 THE COURT: Are you reading from something there?

7 MS. COLE: I'm sorry. This is Exhibit E, with an
8 E.

9 THE COURT: Exhibit B?

10 MS. COLE: E, as in elephant. And this is the
11 Brunner deposition testimony that was submitted by the
12 defendants.

13 THE COURT: Got it. What page?

14 MS. COLE: Page 93, line 24.

15 THE COURT: Just give me a minute.

16 MS. COLE: No, you're -- you're doing better than
17 I can with so much paper.

18 THE COURT: Page 93. Okay. Line 24.

19 MS. COLE: And for me, it was clear that it was
20 Mr. Igoins visit that got him the last contact, because he
21 also said farewell to this business. By transferring the
22 shares from Magnify to Horowitz, he acted contrary to the
23 intention or will beforehand terms that his wife and
24 daughter could replace him, also with regard to the mandate
25 agreement.

1 And again, we are not asking Your Honor to go
2 beyond the four corners of the pleadings. We just wanted to
3 point that out since it is before you.

4 THE COURT: Okay.

5 MS. COLE: What I'd like to do is take a step back
6 and go through the chronology of this entire case because I
7 think it would be helpful to ground our discussion.

8 THE COURT: Go ahead.

9 MS. COLE: I also wanted to point out one of the
10 things we've been talking about is what was submitted here
11 was really a summary judgment motion when we're talking
12 about what inferences should we be drawing based on the
13 fact. And the question is why? Why are they arguing with
14 summary judgment motion here?

15 And I think the reason is clear when you compare
16 this case to the other cases that Your Honor has heard,
17 because in the other cases, the face of the complaint
18 alleged that these Defendants received specific information
19 from BLMIS purporting to trade securities. They got
20 monthly statements that purported to show I bought this many
21 securities. I sold this many or this much. And the
22 question from the Court has been given that background,
23 where do you, Trustee, allege that they were able to look
24 past that and ascertain the truth. That it was all a lie.
25 That no securities were ever being traded.

1 In this case, the only monthly statements, the
2 only specific listings of securities being traded were in
3 the YHA accounts, which are talked about in the complaint
4 and were funded entirely by transfers from Magnify and in
5 the pre-'95 Magnify accounts, which were so blatantly
6 fraudulent that Mr. Wexelbaum has been, you know, trying to
7 convince the Court vociferously that he never saw them
8 before.

9 So all that the Defendants are getting is a piece
10 of paper that says a month or two ago, you had this many in
11 your account and, again, putting aside the circumstances of
12 the portfolio evaluations' creation. So the question is in
13 order to determine that these defendants even thought
14 securities transactions were happening, you'd have to make
15 an inference because they're just getting the holdings.

16 THE COURT: Well, that's a fair inference, though,
17 isn't it?

18 MS. COLE: Huh?

19 THE COURT: They have accounts.

20 MS. COLE: Right. And it may be a fair inference
21 but we're in a motion to dismiss stage. And so if there's a
22 fair inference that maybe they thought they were trading
23 securities and maybe they didn't think they were trading
24 securities --

25 THE COURT: That only goes to the safe harbor

1 issue.

2 MS. COLE: Sure. It goes to actual knowledge.

3 THE COURT: Right.

4 MS. COLE: I mean, all I'm saying is that's why
5 you're being presented with a motion to dismiss at this
6 point because if this case comes down to which inference are
7 you going to draw based on the evidence, which is what this
8 case is going to come down to, it can't be decided on motion
9 to dismiss. It's not the same --

10 THE COURT: Well, I certainly agree with you that
11 the discussion I was having with Mr. Wexelbaum is what
12 documents I can consider --

13 MS. COLE: Right.

14 THE COURT: And it seems like some of the
15 documents can be considered. Whether they are relevant to
16 the disposition of the motion, I don't know, but you know so
17 when you say there's an assignment, you can consider it the
18 assignment. He obviously relied on that to make that
19 allegation. You know, the quoted without attribution from
20 some of the Brunner's testimony, I can (indiscernible)
21 testimony.

22 MS. COLE: Of course, my only response to that is,
23 again, why are you being asked to consider it? Because if
24 there's things you can consider, but the threshold question
25 is why. So, you know, if there's correspondence -- the PE's

1 for example, I believe that the defendant submitted all of
2 the portfolio evaluations themselves. You know, is the
3 Court entitled to consider them? I guess the question is
4 what is the purpose?

5 THE COURT: Well, I feel like you said I wasn't
6 entitled to consider them, but you referred to the --

7 MS. COLE: We --

8 THE COURT: -- giving of these portfolio --

9 MS. COLE: Right.

10 THE COURT: -- as part of your case that he isn't
11 getting monthly statements.

12 MS. COLE: Right, we -- our position is that we're
13 not entitled to beyond the four corners of the complaint on
14 this motion. I'm going towards -- my argument is about the
15 reasoning behind why we're saying you're not entitled to
16 consider that. But let me go back to just the
17 (indiscernible) --

18 THE COURT: Well, it may be meaningless on a
19 motion. It may not contribute to the disposition of the
20 motion, but it seems to me I can look at it. It
21 contradicted something you said, so attached to the
22 portfolio evaluation was six months' worth of trading
23 records, I think I could consider that.

24 MS. COLE: I guess if you're going to rely on it
25 in the disposition. I guess that's the issue and --

1 THE COURT: Well, it doesn't help you in the
2 disposition.

3 MS. COLE: But let me just walk you through the
4 chronology, if that's okay. So this is what the complaint
5 alleges. In 1983, Igoi opened the Magnify 024 account and
6 he deposited about \$3 million. In 1989, Green and Igoi
7 opened the YHA account and the \$3 million was transferred
8 from the 024 account into YHA. From that point forward, YHA
9 got monthly customer statements and all of its money came
10 from inter-account transfers from the Magnify accounts.

11 In 1989, Magnify is transferred to YHA and bearer
12 shares are handed to Green, who is then the only person to
13 deal with the account. In 1990, the Magnify 025 account
14 opens and \$100 million appears out of nowhere. By 1993,
15 Green has begun regularly meeting with Madoff. And his
16 response is I met, you know, once a year instead of twice a
17 year, but he's meeting with Madoff. By the early 1990's,
18 BLMIS had started issuing portfolio evaluations.

19 By mid-1995, BLMIS had stopped issuing customer
20 statements for both Magnify accounts and exclusively
21 produces the portfolio evaluations, meaning they stop
22 generating any of the other stuff that you would get from
23 the AS400. In 1990 --

24 THE COURT: Just when Green becomes the financial
25 advisor for the account?

1 MS. COLE: That happened in 1995, '96. Green
2 opens Premero accounts in 1996. Green negotiates the fee
3 agreement, becomes the financial advisor for the Magnify
4 account, formally. And then in 1998, Green opens Strand as
5 a subsidiary of Magnify. And all of Strand's withdrawals
6 will go to the benefit of Green and his compatriots.
7 Premero and Strand never submit account opening documents.
8 They never received anything other than portfolio
9 evaluations.

10 And by 1999, BLMIS had stopped reporting
11 securities altogether. Even the monthly portfolio
12 evaluations simply list treasury bills and --

13 THE COURT: Well, that was supposed to be his way
14 of doing business, yeah.

15 MS. COLE: Strategy. But they would have had to
16 go, you know, into the market, go back out of the market and
17 come back with treasury bills. And in -- by 2000, they
18 start clearing any reference to securities holdings in the
19 Magnify accounts out of the AS400. Meaning that the AS400
20 system is simply reflecting negative cash balance going
21 further down as the years continue from 2000 to 2008.

22 So that's the chronology in a nutshell. So we can
23 start with the -- do you want to start with the isolated
24 1990 transaction or do you want to start with the portfolio
25 evaluations in terms of evidence of actual knowledge?

1 THE COURT: Well, the earliest point because --

2 MS. COLE: Sure.

3 THE COURT: You know, the allegations are more
4 compelling, I'll say, after 1995 or 1996 after Igoins dies
5 and there's a dispute about whether the complaint
6 sufficiently alleges that Green was the guy who took over
7 effective after that meeting in 1989. So you've told me
8 about those allegations. What happens -- what are the
9 allegations in the ensuing years after that meeting?

10 MS. COLE: After 1989?

11 THE COURT: Yeah.

12 MS. COLE: So the 1990 -- what happens -- the
13 complaint alleges that the 024 account continues from 1989
14 forward. It continues -- it generates about \$3 million in
15 the '80s. And then it generates about \$17 million right at
16 the end of the '80s. And then it -- and then an 025 account
17 opens out of nowhere in September of 1990. And do you walk
18 through --

19 THE COURT: Yeah, I wanted to ask you about that.

20 MS. COLE: -- the statement, yeah.

21 THE COURT: So I understood it. Let me find it.
22 It's 83.

23 MS. COLE: Sure. It's paragraph --

24 THE COURT: Yeah.

25 MS. COLE: -- it's been 82 and 83 on page 25.

1 THE COURT: Yeah. And my confusion is --

2 MS. COLE: Sure.

3 THE COURT: -- it says a net balance of 12
4 million --

5 MS. COLE: Yes.

6 THE COURT: -- 12.3 million. And what does that
7 mean?

8 MS. COLE: So here's --

9 MR. WEXELBAUM: I'm sorry, what are we referring
10 to?

11 MS. COLE: My --

12 THE COURT: We're referring to paragraph -- the
13 statement -- the screenshot of paragraph 82.

14 MS. COLE: The screenshot between 82 and 83 in the
15 complaint, in the SAC.

16 MR. WEXELBAUM: Thank you.

17 THE COURT: What is the net balance referred to?

18 MS. COLE: So here's what this statement is
19 showing you. The no balance forward is the indication that
20 this is the first account statement. The first entry --
21 sorry, go down all the way to the bottom. The bottom entry
22 on here is -- it says the trade date 10/21, settle date
23 10/28.

24 THE COURT: That I understand.

25 MS. COLE: Okay.

1 THE COURT: What I don't understand is you show a
2 net balance of \$12 million, but then you show positions of
3 \$84 million and seem contradictory. I assume that the \$84
4 million reflects the value of all of the securities listed
5 as of the end of the statement. But what is the new balance
6 \$12 million referred to?

7 MS. COLE: It's the cash -- it's the cash balance.

8 THE COURT: It's cash?

9 MS. COLE: Correct.

10 THE COURT: So is the value of the account the \$84
11 million plus the \$12 million, is that what that's supposed
12 to mean?

13 MS. COLE: Right. It's about \$100 million.

14 THE COURT: Okay. Thanks. Did Brunner testify
15 what he did with these statements? These Magnify statements
16 that he was receiving in the early '90s?

17 MS. COLE: I believe Brunner testified that he
18 held on to them for a while and then -- I'm going to -- I'm
19 looking at my colleague, Ms. Wang, who deposed Mr. Brunner.

20 THE COURT: Okay.

21 MS. WANG: Yeah. I took the deposition. He
22 testified that he retained them and then he didn't -- he
23 kept them until sometime in the '90s and --

24 THE COURT: So he didn't send them to Igo or
25 Green?

1 MS. WANG: That's my understanding. That's what
2 he said. And that he didn't retain them -- you know, he
3 thought that he had copies for Magnify.

4 MR. WEXELBAUM: I don't disagree with what
5 Ms. Wang said. I think he said after so many years, he
6 would clean out his records and throw away stuff. All that
7 he retained -- that he still had when we were deposing him
8 was what was on his desk that he had never thrown out.

9 THE COURT: But he could -- there's no testimony
10 that he ever sent them on?

11 MR. WEXELBAUM: That's what (indiscernible).

12 THE COURT: Even though he was not really
13 participating in the business aspects that (indiscernible)?

14 MR. WEXELBAUM: Correct.

15 THE COURT: Okay.

16 MS. COLE: Right, so and again the allegation
17 here --

18 THE COURT: So the question I have is if he's not
19 sending these on, how does Igoins or Green for that matter
20 know what money is in the account and what they can pull
21 out?

22 MR. WEXELBAUM: Green did not know.

23 THE COURT: All right. How did Igoins know?

24 MR. WEXELBAUM: He should not have known because
25 he wasn't involved with it.

1 THE COURT: How did Igo in know?

2 MR. WEXELBAUM: Perhaps Mr. Madoff was sending
3 other copies to Mr. Green -- to Mr. Igo in privately.

4 THE COURT: Is there any evidence of that?

5 MR. WEXELBAUM: Pardon me?

6 THE COURT: Is there any evidence of that?

7 MR. WEXELBAUM: We've seen none. They have the
8 records, we don't. They have the BLMIS records.

9 THE COURT: Okay.

10 MS. COLE: So our allegation is that based on the
11 fact that the customer statement that was created, that it
12 did, in fact, know it has the new 025 account, it started
13 spending money out of the 025 account. So the inference is
14 that it was aware that the \$100 million appeared. And
15 because we alleged that the person in charge of Magnify as
16 of 1990 was Green that the person who was aware of that was
17 Green.

18 THE COURT: Did Brunner testify that Green spoke
19 to him at all prior to Igo in's death about the accounts or
20 what was in the accounts? I'm asking if there was any
21 testimony.

22 MR. WEXELBAUM: No.

23 MS. COLE: I --

24 MR. WEXELBAUM: (Indiscernible). No.

25 MS. COLE: I don't remember, actually. I don't

1 remember.

2 THE COURT: Okay.

3 MS. COLE: I don't remember.

4 MR. WEXELBAUM: I believe, Your Honor, the only
5 contacts, and Ms. Wang can correct me if she thinks I'm
6 wrong, between Mr. Brunner and Mr. Green before 1995 after
7 Mr. Igoins died, were when Mr. Green formed Premero in 1992,
8 three and four years before the Premero BLMIS accounts were
9 ever opened. And he sent the minutes and the resolutions to
10 Mr. Brunner and asked him to become the director of this new
11 client, Premero. So they did communicate regarding Premero,
12 but not with respect to Magnify.

13 THE COURT: Did he testify about -- did Brunner
14 testify about what he was doing with the portfolio
15 evaluations that he was getting until about 1997?

16 MS. COLE: I believe Brunner disclaimed -- did he
17 disclaim the (indiscernible) portfolio evaluations? Because
18 were they only related to --

19 THE COURT: Because his name is on the portfolio
20 evaluations I think before 1996 or 1997, whatever the date
21 is.

22 MR. MCMILLAN: Yeah, Your Honor, to the best of my
23 recollection, he testified that he had never even seen the
24 portfolio evaluations.

25 THE COURT: Because they're addressed -- some of

1 them are addressed to him, right?

2 MR. MCMILLAN: Correct.

3 THE COURT: Right. So while Brunner is getting
4 the monthly customer statements from Magnify and not sending
5 them on, how much money is pulled out of Magnify?

6 MS. COLE: The first \$8 million --

7 THE COURT: Is this in the B --

8 MS. COLE: It's in Exhibit B, uh-huh.

9 THE COURT: Okay. Because you know the amounts
10 are very small in the '80s.

11 MS. COLE: They are.

12 THE COURT: Until you get to that one big
13 withdrawal which basically zeroes out the account.

14 MS. COLE: Right. The real activity starts after
15 1989. Right, it starts in the '90s which is when, of
16 course, the shares were transferred to YHA.

17 THE COURT: Well, in March of '89, the account is
18 zeroed out. There's a \$3 million transfer to YHA and --

19 MS. COLE: Right, the 024 account --

20 THE COURT: Okay.

21 MS. COLE: -- is zeroed out.

22 THE COURT: Right. Is the trust, I realize I'm
23 getting beyond the motion to dismiss --

24 MS. COLE: Yes.

25 THE COURT: -- but I'm just curious about the

1 case. Was there any evidence, and I saw the withdrawal
2 request, but was there any evidence about who was initiating
3 these transfers to YHA and subsequent transfers, I guess, to
4 charities? In other words, why was this happening when it
5 was happening? Any evidence of any --

6 MS. COLE: I'm sorry. I'm trying to --

7 THE COURT: Yeah. No, I'm just curious about who
8 was deciding when to transfer money and why. I've seen the
9 authorization request and I understand your theory that it's
10 really -- presumably it's Green who's telling him to do it.
11 But is there any evidence that Green requested that they
12 transfer money from Magnify to YHA or --

13 MS. COLE: The -- yes.

14 THE COURT: Is that alleged or --

15 MS. COLE: Yes, the transfers --

16 THE COURT: -- I should start with the complaint.

17 MS. COLE: -- from Magnify to YHA's inter-account
18 transfer, those are directed by Green.

19 THE COURT: Where is that alleged?

20 MS. COLE: That is alleged --

21 THE COURT: Starting when, I'm sorry.

22 MS. COLE: Thank you. Paragraph 66 says after
23 Igoin's death, Green dramatically escalated the --

24 THE COURT: Well, that's 1995.

25 MS. COLE: Right, right.

1 THE COURT: Because the big -- the first big
2 transfer is in 1989.

3 MS. COLE: From the 024 account. And then there's
4 a --

5 THE COURT: Right.

6 MS. COLE: -- \$8 million transfer from the 025
7 account.

8 THE COURT: No, I understand that, but --

9 MR. WEXELBAUM: Every transfer, Your Honor, that
10 Green asked them to make from Magnify to YHA was documented
11 by a letter that Green sent to Madoff or BLMIS. None of
12 them took place prior to Igoins death.

13 THE COURT: I thought I saw a lot of documents or
14 transfer requests from -- to Nahir and somebody else.

15 MR. WEXELBAUM: You're talking about Mrs. Amir
16 (ph), I think.

17 THE COURT: Yeah.

18 MR. WEXELBAUM: Who got \$300,000. Yes, Albert
19 Igoins and Doris Igoins. Albert Igoins was raised by his
20 sister.

21 THE COURT: No, no, no. I'm asking something
22 else.

23 MS. COLE: Right. Those are transferred from YHA.
24 Those were transfers out of YHA -- out of BLMIS, not inter-
25 account transfers from Magnify to --

1 THE COURT: Okay.

2 MR. WEXELBAUM: No, one minute. The transfers to
3 Mrs. Nahir and to Mrs. Amir were from the Magnify account,
4 not YHA.

5 THE COURT: I was asking something different. I
6 remember seeing a lot of requests, I guess to come take
7 money out of the YHA account signed by Igoin's niece.

8 MR. WEXELBAUM: Igoin's niece was one of them.

9 THE COURT: And somebody else who --

10 MR. WEXELBAUM: Officers of the foundation.

11 THE COURT: Who was a director. And the question
12 I had asked Ms. Cole and it may not be part of the complaint
13 is who's telling them to do it.

14 MS. COLE: And the complaints -- on paragraph 53,
15 the complaint says Green opened an account at Hapoalim for
16 YHA, which was funded by an inter-account transfer of \$3
17 million from the Magnify account.

18 THE COURT: You know, he was also the lawyer for
19 YHA though, wasn't he? So the fact that he opened an
20 account doesn't necessarily mean anything, does it?

21 MS. COLE: Which -- it's a good time to talk about
22 his control of YHA.

23 THE COURT: Okay.

24 MS. COLE: And we -- but we corrected -- I
25 apologize for our -- we misspoke when you asked us the

1 question for the source of Green holds himself out.

2 THE COURT: Yes.

3 MS. COLE: I'm sorry, I --

4 THE COURT: It's paragraph 55.

5 MS. COLE: I'm sorry. I can't find

6 (indiscernible). Sorry. Here it is. The source is the bio

7 -- the Green bio for the Milken Institute Global Conference.

8 THE COURT: It's the Green bio?

9 MS. COLE: Green's bio.

10 MR. WEXELBAUM: That is something that we have
11 never seen, but a third party document cannot establish that
12 Green was holding himself out as anything.

13 THE COURT: Well, it's not proof, but you know --

14 MS. COLE: Like I said --

15 THE COURT: Did he -- he presumably adopted it.
16 But in any event, it provides a basis for the statement in
17 the pleading. It may not be admissible but I don't know
18 that a pleading -- the facts pleaded in the complaint have
19 to be based on admissible evidence.

20 MS. COLE: So --

21 MR. WEXELBAUM: He was the --

22 THE COURT: So this is --

23 MR. WEXELBAUM: -- (indiscernible).

24 THE COURT: -- Green's -- what -- do you have a
25 copy?

1 MS. COLE: That was his bio, but there's -- right.

2 There are additional, I think, allegations that would be
3 helpful. But that particular one, paragraph -- is it 55?

4 THE COURT: Yeah. It's a Green bio from what?

5 MS. COLE: It's a Green bio from a conference.

6 THE COURT: I know that when I'm asked to submit
7 bios, I write them myself and send them on. What was the
8 conference?

9 MS. COLE: Milken Institute Global Conference.
10 And I don't have the date here.

11 THE COURT: Okay.

12 MS. COLE: Thank you. But so let's look at the --
13 there are some allegations in the complaint, I think, that
14 could be helpful. You -- we already looked at the -- sort
15 of the allegation in paragraph 144 that Your Honor pointed
16 out.

17 THE COURT: 144?

18 MS. COLE: Which was the held himself out publicly
19 and privately.

20 THE COURT: Well, yes.

21 MS. COLE: Right. So if you look at paragraph
22 143, the complaint alleges -- let's start with 142. The
23 universities and corporations that received donations from
24 YHA acknowledged that Green played a significant role in
25 YHA's decisions to give grants to particular organizations

1 and often presented project proposals to YHA's boards.
2 Organizations would also go directly to Green to request
3 funding.

4 After proposal was agreed to by the board, Green
5 and only Green was responsible for negotiating and drafting
6 the agreements, governing any funds YHA chose to give.
7 Doing so enabled him to have ultimate control over the terms
8 and conditions.

9 143, Green also signed many of these grant
10 agreements himself, not in his capacity as YHA's attorney.
11 Instead, many grant agreements were framed as an agreement
12 between the recipient and Green as the Trustee for an
13 anonymous donor who had discretion over the terms and
14 amounts of the grant on the donor's behalf. This
15 effectively removed YHA from the terms of the agreement,
16 solidified Green's controlled the money.

17 Paragraph 144, starting in the middle of the
18 paragraph. Green was also -- Green also was largely
19 responsible for selecting and appointing the members of
20 YHA's board who joined after YHA's initial formation.

21 THE COURT: Where are the allegations relating to
22 the various awards that he received?

23 MS. COLE: I'm looking, Your Honor. Where is it?

24 THE COURT: Paragraph 8.

25 MS. COLE: There you go, I'm sorry. In the middle

1 of the paragraph, for example. YHA gave Bar Ilan University
2 and Ben Gurion University grants totalling more than 28
3 million. Afterward, Green received honorary doctorates from
4 both institutions and was appointed to Ben Gurion
5 University's investment in management (indiscernible).
6 Green was also elected to the Board of Trustees of the
7 Weizmann Institute in Israel, which received more than \$13.5
8 million from YHA.

9 Hebrew University, which employed two YHA board
10 members received more than \$36 million from YHA.

11 THE COURT: So I guess the question I have, Mr.
12 Wexelbaum, is why is he receiving all of these accolades if
13 he's just an attorney for YHA?

14 MR. WEXELBAUM: Not having been on any of the
15 committees that appointed him, I don't know. I know that
16 Mr. Green has his own charitable foundation, a private one.
17 But none of this -- none of this alleges or infers actual
18 knowledge that BLMIS was not trading securities. None of
19 it.

20 The fact that Green was -- at paragraph 142,
21 everything alleged in there is what an attorney would do.
22 There's nothing sinister or nefarious --

23 THE COURT: Well, it said, though, he was signing
24 grants --

25 MR. WEXELBAUM: -- about that.

1 THE COURT: -- not as an attorney but as a Trustee
2 for an anonymous donor.

3 MR. WEXELBAUM: That was the -- that was paragraph
4 143, not 142.

5 THE COURT: Right.

6 MR. WEXELBAUM: And again, that has nothing to do
7 with -- no actual knowledge. There is no dispute that
8 Mr. Igoin was a very private individual and did not want his
9 name to be used after the initial founding of YHA, he wanted
10 his name to be kept confidential. And that's the way it was
11 handled. But that doesn't --

12 THE COURT: Is there a dispute as to that? That
13 Igoin preferred to be anonymous, in his charitable giving
14 anyway?

15 MS. COLE: I don't know that the complaint in this
16 action goes into this other than to say that the initial
17 registration filing does name Igoin and then later says that
18 Igoin wished to remain anonymous. There is an active
19 dispute in the Israeli action about --

20 THE COURT: The registration filing for Magnify?

21 MS. COLE: The actual -- YHA's registration.

22 THE COURT: Okay.

23 MS. COLE: Identifies Igoin as donor.

24 MR. WEXELBAUM: Your Honor --

25 MS. COLE: The initial one.

1 MR. WEXELBAUM: (Indiscernible), but I believe
2 there's an allegation in the second amended complaint that
3 YHA and Green took steps to conceal Igoin's identity as the
4 person involved with YHA. I believe that is in this
5 section. (Indiscernible). Am I correct?

6 MS. COLE: It may be --

7 MR. MCMILLAN: I think the allegation there, and I
8 can point to the specific one, is that the registrar in
9 Israel made repeated requests that YHA and Green
10 specifically reveal the name of the donor and YHA refused to
11 do so.

12 THE COURT: Thank you.

13 MR. MCMILLAN: Paragraph 54, Your Honor.

14 MS. COLE: Okay. So let's turn to the portfolio
15 evaluation, because whether or not, right, we've got the
16 creation of value out of nowhere of \$100 million. And
17 whether or not Green had been in the picture before or after
18 that happened, he is certainly in the picture by the mid-
19 1990's.

20 So here is the only documentation that is ever
21 created by BLMIS for the accounts are the portfolio
22 valuation. And this is how -- I'll talk first a little bit
23 of how that's created and then sort of what's in them.
24 Paragraph 90, the Green tab.

25 These portfolio evaluations were manually

1 generated on a BLMIS desktop computer. As discussed before,
2 they contained no historical evaluation information or any
3 transaction details for any security allegedly bought or
4 sold for the relevant account, such as trade dates,
5 settlement dates, or trade (indiscernible).

6 92, by 1993, if not earlier, Green began meeting
7 with Madoff personally 2 to 3 times per year to discuss
8 Magnify, and later, Premero and Strand account. These
9 meetings usually occurred roughly one to two months after
10 the dates listed on the portfolio evaluations generated for
11 those accounts, which were dated as of June 30th or December
12 31st of each year.

13 94, Green was treated with special care by Madoff
14 and BLMIS' employees on Exhibit --

15 THE COURT: Well, actually, 92 --

16 MS. COLE: Okay.

17 THE COURT: -- supports something that

18 Mr. Wexelbaum said or speculated about, that

19 February 26th letter in which Green was given a portfolio
20 evaluation, was probably for the two months preceding,
21 right? December 31, 1996, I guess, or 1995.

22 MS. COLE: We're only aware of portfolio
23 evaluations for the two months preceding, the June and the
24 December.

25 THE COURT: All right. Okay.

1 MS. COLE: Ninety-Four: Green was treated with
2 special care by Madoff and BLMIS his employees. Green
3 special treatment particularly access to Madoff himself
4 perplexed BLMIS' employees.

5 Ninety-Five: By the mid-1990s, during his regular
6 meetings with Madoff, Green participated in the preparation
7 and revision of the portfolio evaluation.

8 THE COURT: That's a very general statement, in
9 some of the other cases I've had -- there were very specific
10 allegations about what the Defendant did, you know, with
11 creating losses, creating value.

12 And you're just saying that he participated in the
13 preparation. Do you allege what he did?

14 MS. COLE: Well, we allege that in 97, and I'll
15 explain a little bit more in a minute, we allege that upon
16 Green's arrival, Green would meet behind closed doors with
17 Madoff and DiPascali and, then, DiPascali would emerge from
18 the meetings with changes (indiscernible) portfolio
19 evaluation that we believe were directed by Green.

20 And the difference that you have to remember
21 between this case and the other cases is that there was no
22 paperwork being generated. So, in order to hit a specified
23 return, Madoff and BLMIS didn't need to rewrite
24 (indiscernible) statements or back in to anything that would
25 be visible to anyone. They could simply talk about it,

1 directly. They were having meetings with DiPascali and
2 Madoff and Green and no one else.

3 THE COURT: But the point I was making was that in
4 some of these other cases the allegations were very specific
5 about the changes that were made or the additions that were
6 made.

7 MS. COLE: Right.

8 THE COURT: Here you're alleging that he would
9 meet and then changes would be made in the portfolio
10 evaluation following the meetings.

11 But, you know, I don't know what that means.
12 For all I know, it could be the address.

13 MS. COLE: It --

14 THE COURT: Go ahead.

15 MS. COLE: Sure. Can I get some water?

16 THE COURT: Sure.

17 (Pause)

18 MS. COLE: There are two sets of allegations
19 relating to what was discussed at those meetings.

20 The first is the specific allegation, the changes
21 that were made, at the meeting, which were the final -- the
22 finalization of the Premero account statements.

23 So, the Premero accounts, and we can talk about
24 that first, the Premero account, before Green's meeting,
25 would be in one statement. Accounts one and two would be on

1 one statement that was stamped draft. Okay? These are the
2 holdings of both Premero accounts.

3 They'd go into the meeting. When they
4 emerged from the meeting, there were -- DiPascali would hand
5 off the statements to an employee and say, here's how you
6 divide this up and divide up the holding into the two
7 different accounts for a date as of two -- one to two months
8 ago.

9 THE COURT: So, what?

10 MS. COLE: So, if it were -- it would be one thing
11 if you said divide up the holdings that I have today, right?
12 I want to divide up my holdings today this way.

13 He's saying, I want to say that as of December
14 31st, there were 75 shares of AT&T in Premero I and there
15 were 150 in Premero II as of two months ago.

16 THE COURT: But that's a lot different from, you
17 know, saying please generate these specific trades so that
18 it could have been my account and that'll be my compensation
19 for some service that I'm performing.

20 MS. COLE: I disagree --

21 THE COURT: Is it a backdating? Yeah. But it
22 doesn't necessarily indicate that -- knowledge that there's
23 no actual securities that are being traded in those -- in
24 that account.

25 MS. COLE: Well, but if -- if it were real

1 securities, how would you be able to say, I want the account
2 to hold a different number of securities than it held. I
3 want -- I'm deciding today what my account should have held
4 two months ago. If this were real.

5 THE COURT: Well, does it -- there's a difference
6 between backdating and creating -- backdating real trades
7 into two accounts and creating trades out of whole cloth.
8 That's all I'm saying.

9 MS. COLE: Right. And, then, let's get to your
10 point about creating trades out of whole cloth because, of
11 course, no trades were ever created.

12 And that's really the bottom line here that
13 distinguishes this case from every other case that you've
14 heard.

15 THE COURT: This is a little different. I agree
16 with you.

17 MS. COLE: There were no trades. There were no
18 trades.

19 THE COURT: Is this --

20 MS. COLE: There were --

21 THE COURT: Is this the only case where you have
22 no trading information?

23 MS. COLE: This is the only case where we have no
24 trading information. This is the only case where BLMIS did
25 not bother to generate any documentation whatsoever that he

1 could have shown the customer in real time.

2 THE COURT: You know, I have a question.

3 MS. COLE: Uh-huh.

4 THE COURT: It's not -- it may not be pertinent to
5 your complaint but it's one that I've wondered about.

6 Why was Madoff letting someone like Igo in or
7 whatever pull all this money? It's not like they were
8 investing money with him.

9 MS. COLE: At -- and there are a few Defendants in
10 this case, Your Honor, that Madoff let pull out --

11 THE COURT: Well, let take out a full \$7 billion.

12 MS. COLE: Exactly, \$7 billion.

13 THE COURT: Well --

14 MS. COLE: Igo in pulled out --

15 THE COURT: Yep. Picower (ph) --

16 MS. COLE: -- \$300 million.

17 THE COURT: -- at least one of his customers.

18 Igo in never -- you know, never put more than \$3 million into
19 the account. Why is Madoff letting him pull all this money
20 out or Green or whoever.

21 MS. COLE: That is a good question, Your Honor.

22 THE COURT: And it's one you can only speculate
23 on, right?

24 MS. COLE: But the point is because this is
25 Madoff, to Mr. Wexelbaum's point, it is what happened. It's

1 not completely implausible or impossible or --

2 THE COURT: Yeah. I was just -- I'm just curious
3 about why he -- I mean, I might understand the motivation of
4 people who invested in it.

5 MS. COLE: Uh-huh.

6 THE COURT: I was just wondering at the other end,
7 why Madoff was doing this. But -- I thought you might have
8 some insight into that.

9 MS. COLE: Right. My -- and, again, because this
10 is not directly relative to this complaint, but my team is
11 reminding me that the Igoi family put -- did put some money
12 in --

13 THE COURT: Oh, okay.

14 MS. COLE: -- as well. But they were still --

15 THE COURT: A billion dollars.

16 MS. COLE: Exactly. And they were still large net
17 winners.

18 So, it does make -- it doesn't, I think, answer
19 Your Honor's question.

20 Let me talk about -- a little bit about the face
21 of the PEs because it is important in terms of the question
22 -- because the ultimate question here is have we alleged
23 facts that suggest a plausible inference that he knew that
24 no securities trade were taking place.

25 And, again, this is the only case where he wasn't

1 purporting to trade securities.

2 THE COURT: Isn't it fair to infer, from the
3 portfolio evaluations, that they summarized positions based
4 on securities trades?

5 MS. COLE: Well -- and that's the question. Is
6 that a fair inference?

7 We allege, based on all of the evidence that is
8 alleged in the complaint, it's really not even a fair
9 inference. But, at the motion to dismiss stage, the
10 question is; is it a plausible inference that they did not
11 believe it was summarizing securities trades when there is
12 no evidence that there were securities trades happening.

13 So --

14 THE COURT: Did you attach one of these portfolio
15 evaluations?

16 MS. COLE: We did it through -- we did a screen
17 shot of one of them.

18 THE COURT: Where?

19 MS. COLE: It is at paragraph -- right? Page 33.

20 (Pause)

21 MS. COLE: Right. So, if you see on the specific
22 list of purported holdings that -- with a net market value
23 of \$600 million dated as of 12/31/1999.

24 And from this period forward, he would only be
25 lists of treasury bills dated as of every six months which

1 means that -- the question is why would he believe that
2 these were summarizing securities trades when all you're
3 seeing is treasury bills that are increasingly setting
4 value, which is what the complaint alleges, with no
5 explanation of how that happened.

6 THE COURT: But aren't they different treasury
7 bills that were --

8 MS. COLE: They are. And what's interesting is
9 that doesn't -- they don't match up. They're different
10 treasury bills.

11 So, these treasury bills, the rate of return would
12 get you to X on these treasury bills. Next -- the next
13 statement's treasury bills do not add up to what that rate
14 of return would have been.

15 And that's in the complaint.

16 THE COURT: Well, these are just unrealized gains.
17 They're not --

18 MS. COLE: But you can actually measure, right,
19 how much -- how much these would be worth six months from
20 now if they were the same and they don't link back.

21 So, you know, this is never -- it's an increasing
22 amount of money that, as Your Honor pointed out, even from
23 '95 to 2008, went from half -- you know, 400 million to 800
24 million and --

25 THE COURT: Just based on treasury bills?

1 MS. COLE: From '99, it was just based on treasury
2 bills, correct.

3 And the question is, if -- you know, I think that
4 the case file is clear that a customer may not have an
5 obligation to look behind a summary.

6 They might have -- they might not be obliged to
7 look at the background data and see what's supporting this.
8 But a customer may ask, over a period of decades, hey,
9 what's going on with my account.

10 (A) Hey, I need a cost basis for this share. When
11 did we buy it? Any information whatsoever about their
12 account. Hey, how much cash is in my account so that I can
13 --

14 THE COURT: I want to ask you; did Madoff send
15 1099s for any of these accounts to any of these account
16 holders?

17 MS. COLE: He -- we allege about tax withholding
18 on paragraph --

19 THE COURT: But he -- but presumably the owners of
20 the accounts -- the accountants for the owners of the
21 accounts would have to know --

22 MS. COLE: Exactly.

23 THE COURT: -- what was withheld and what needs to
24 be paid with a 1099.

25 MS. COLE: And he -- and Madoff did for some

1 customers. I just don't know if he did for these customers.

2 I believe he -- I'm sorry.

3 UNIDENTIFIED SPEAKER: 1099s?

4 MS. COLE: Not 1099s. I'm sorry, with 1099(a).

5 (ph). I'm sorry. With 1099 informations.

6 THE COURT: Is -- how is that reflected though?

7 Doesn't the broker send a 1099?

8 For instance -- Ms. Cole.

9 MS. COLE: I'm sorry.

10 THE COURT: You used an example where a stock in
11 the account, an equity in the account, that's traded and a
12 gain is realized. I know I get a 1099 which tells me what
13 the gain is.

14 Was he sending those types -- that type of
15 information out to account holders?

16 MS. COLE: In these accounts, no. I don't believe
17 he was sending them to -- was he not to any account holders?

18 THE COURT: All right.

19 MS. COLE: Do we know?

20 UNIDENTIFIED SPEAKER: On these, no.

21 MS. COLE: Of these accounts, no.

22 UNIDENTIFIED SPEAKER: No.

23 MS. COLE: I don't know if he's asking case-wide.

24 UNIDENTIFIED SPEAKER: Case-wide, yes.

25 MS. COLE: Case-wide, yes.

1 THE COURT: Pardon.

2 MS. COLE: Case-wide, he was, I am told.

3 UNIDENTIFIED SPEAKER: (Indiscernible).

4 MR. WEXELBAUM: What did you say, Tracy? I'm
5 sorry.

6 MS. COLE: For 1099 -- you get a 1099 when gain is
7 realized in your account. Was Madoff ever sending them out?

8 For these accounts, he was not. The question was
9 whether he was case-wide.

10 I'm sorry.

11 (Pause)

12 THE COURT: Can I turn to a different subject?

13 MS. COLE: Uh-huh.

14 THE COURT: This goes with the -- goes to this
15 issue of piercing the corporate veil.

16 MS. COLE: Sure.

17 THE COURT: One of the points you make is that
18 there are no declarations, citations to learned treatises,
19 the things that a court would normally consider in deciding
20 foreign law.

21 On the other hand, the Defendants have provided me
22 with some Southern District cases where, you know, in one of
23 the Judge Cote goes through the English law in terms of the
24 piercing or alter ego liability.

25 Do I need declarations when I have an analysis by

1 a district court judge about at least the English law? The
2 Panamanian was a little weaker but --

3 MS. COLE: Right. And, certainly for Panamanian,
4 it is -- if all of that is being proffered is a case that
5 says in this case, the court held this way, that's
6 insufficient for the Court to make a determination of what
7 the law -- of what the law is.

8 It -- if this is the holding in a particular case
9 the court's reasoning applied to that case. So, you
10 wouldn't try to make a determination of, you know, New York
11 law based on a single case.

12 That case, the English law case itself, was one
13 where the court went through and did significant research
14 and made an entire summary of the law.

15 So, that -- for that specific issue, in that case,
16 that was supported.

17 THE COURT: I understand --

18 MS. COLE: Right.

19 THE COURT: -- what you're -- what you're saying
20 is that I don't have an expert who says, some facts of this
21 case, this would be the result under English law --

22 MS. COLE: Right.

23 THE COURT: -- or Panamanian law. Okay.

24 Let me ask from -- let me hear from Mr. Wexelbaum
25 on that.

1 MR. WEXELBAUM: On piercing? I have a few points
2 on (indiscernible) --

3 THE COURT: Well, the question I --

4 MR. WEXELBAUM: -- on piercing the corporate veil
5 --

6 THE COURT: (Indiscernible) --

7 MR. WEXELBAUM: I'm sorry.

8 THE COURT: The question I raised is do I have
9 sufficient record to make that determination or should I
10 simply deny without prejudice that aspect --

11 MR. WEXELBAUM: I think you should --

12 THE COURT: -- of the (indiscernible)?

13 MR. WEXELBAUM: -- clearly decide the issue and
14 decide it in our favor, Your Honor.

15 THE COURT: So, what's --

16 MR. WEXELBAUM: Judge Cote said, in her decision,
17 that you've referred to, that expert reports, while could be
18 used, are absolutely not necessary.

19 It's the function of a judge to interpret the law.
20 Your Honor is a very competent judge and you can interpret
21 the law if we provided nothing to you but we did provide you
22 with good case law.

23 THE COURT: (Indiscernible) -- well, normally when
24 somebody says that to me, I say, okay. Give me law.

25 So, for example, I have in my files the BVI

1 Insolventcy Law, the Cayman Island Insolventcy Law.

2 And, yeah, I can -- you know, I can go and look at
3 the law and read it. I don't have the law in Panama or --
4 well, it's -- I don't have the BVI Company's Act, I don't --

5 MR. WEXELBAUM: But we provided you with case law.
6 The Panam case, which is a U.S. case, deals with the fact
7 that under Panama law (indiscernible) a company can only be
8 pierced if it was used for the sole purpose of perpetrating
9 fraud or violating law.

10 THE COURT: So, why can't I say conclude that
11 Green was using these various companies, assuming I accept
12 the allegations as sufficient that by 1989, he had taken
13 over this and knew what was going on, that he was using
14 these companies to perpetrate a fraud on the other customers
15 of BLMIS?

16 MR. WEXELBAUM: The fraud that we're talking about
17 is the fraud perpetrated by BLMIS. It wasn't Magnify's
18 fraud or Premero's fraud or Strand's fraud.

19 And the facade, there was no corporate facade
20 created to avoid personal liability here. That's not what
21 happened. It's just not a proper case for veil piercing or
22 alter ego.

23 And it's discussed, at length, by Judge Cote, in
24 her decision, I know that was on English law, but we have
25 the Panam case and the other case that we cite. What was

1 the name of the other case (indiscernible)?

2 UNIDENTIFIED SPEAKER: Jonas.

3 MR. WEXELBAUM: The Jonas case under Panama law.

4 THE COURT: Jonas.

5 MR. WEXELBAUM: And I think under those cases, you
6 clearly -- Jonas and Panam indicate you can only reach
7 shareholders and maybe directors, not officers. Green was
8 neither a shareholder nor a director.

9 THE COURT: I thought he was a managing director.

10 MR. WEXELBAUM: That's an office, Your Honor.

11 THE COURT: Well (indiscernible) --

12 MR. WEXELBAUM: The sole director was Mr. Brunner.
13 That's the board of directors. Managing director is a term
14 used to connote an officer, not a director.

15 THE COURT: I don't know that. But, in any event,
16 if he's the guy that's running the company and the
17 management of the company is vested in the directors; isn't
18 he a de facto director?

19 MR. WEXELBAUM: He's --

20 THE COURT: I know that, under English law, they
21 have shadow directors and, you know, those kinds of things.

22 MR. WEXELBAUM: But I think under the case law
23 that we cited at some length, it's clearly a question that
24 should be decided under the laws of the states of
25 incorporation and that, under their laws, there should be no

1 veil piercing in this case, Your Honor.

2 Can I respond to a few other things Ms. Cole
3 mentioned?

4 THE COURT: Sure. Sure.

5 MR. WEXELBAUM: She made an issue about the fact
6 that in 1999 the portfolio evaluations started showing,
7 instead of a list of actual securities, a list of the
8 treasury bills and the Fidelity money market holdings.

9 THE COURT: Right.

10 MR. WEXELBAUM: That was universal in the BLMIS
11 fraud. You -- Your Honor referred to it in --

12 THE COURT: No. In every -- in every -- oh, oh,
13 you mean the -- I know what you mean.

14 MR. WEXELBAUM: At the end of the reporting period
15 --

16 THE COURT: (Indiscernible) --

17 MR. WEXELBAUM: -- he went out of the -- you
18 mentioned in Kingate. So, they alleged it in Kingate.

19 THE COURT: Well, I know. But how -- how did --

20 MR. WEXELBAUM: And --

21 THE COURT: -- how does --

22 MR. WEXELBAUM: -- the reason the account would be
23 different, and the treasury bills would be different six
24 months later, is because he purportedly went back into the
25 market.

1 THE COURT: But Green is the manager of the
2 accounts. He's the financial advisor for Magnify, as I
3 recall. He's getting paid for that. And he doesn't even
4 know what stocks are being -- or what equities are being
5 traded.

6 Wouldn't you think that if he -- if he really
7 thought that they were being traded, he'd ask?

8 MR. WEXELBAUM: Your Honor, Mr. Igoine came to him
9 and said this is the way Madoff reports to me on these
10 accounts.

11 Mr. Madoff was the wizard of Wall Street. People
12 were ecstatic if Madoff would let them -- if Madoff would
13 let them give him his -- their money.

14 And he just continued the process that he was
15 handed by Mr. Igoine and he didn't go beyond that. That
16 doesn't mean he had actual knowledge. There was nothing
17 that came remotely close to the Merkin allegations or the
18 Legacy allegations where these people knew stuff was not
19 right, simply not right. Yet, you found no actual
20 knowledge.

21 Mr. -- maybe Mr. Igoine -- Ms. Cole cited the law.
22 There's no obligation to investigate your stockbroker by an
23 investor.

24 THE COURT: I agree.

25 MR. WEXELBAUM: He accepted what was given to him

1 as gospel and I'll refer to the English Court decision that
2 we asked you to take judicial notice of.

3 That judge commented upon Mr. Madoff's reputation,
4 throughout the world, throughout the financial industry and
5 the world at large, and there was no basis for these people
6 to disbelieve that he was just a stockbroker, investment
7 advisor, financial advisor genius.

8 THE COURT: But there were people who blew
9 whistles from the beginning. They may not have been
10 believed but there were people.

11 MR. WEXELBAUM: They may have. But we didn't have
12 any knowledge of that.

13 THE COURT: All right.

14 MR. WEXELBAUM: And I -- Ms. Cole also mentioned
15 the cleaning out of all of the trade information.

16 Well, first of all, that does indicate there was
17 trade information in the internal records of BLMIS.
18 However, the --

19 THE COURT: I didn't understand that. The trade
20 information for these accounts?

21 MR. WEXELBAUM: For these accounts. And, then,
22 they cleaned it out. I think they even allege that in their
23 second -- there came a point in time --

24 THE COURT: I don't (indiscernible) --

25 MR. WEXELBAUM: -- (indiscernible) --

1 THE COURT: -- that the allegation was there was
2 no trading information other than these portfolio
3 evaluations to the extent they were flat out trading.

4 MR. WEXELBAUM: My recollection is that there
5 were, Your Honor, and that there came a point in time when
6 they said the internal records were then cleared out and
7 then no longer maintained.

8 So, for a period of time, there were these
9 records. But my point is --

10 THE COURT: My recollection of this case, not
11 necessarily this adversary proceeding, is that from 1998 on,
12 they had basically all the records, bank records, trading
13 records, everything.

14 MR. WEXELBAUM: But, in this case, I think they
15 said he kept records up to a certain point. Then stopped
16 keeping them.

17 THE COURT: I think for Magnify they said he was
18 getting monthly statements. YHA was always getting monthly
19 statements because I saw a last statement for YHA.

20 Magnify was getting statements and then they
21 stopped at some point. I don't remember.

22 MR. WEXELBAUM: Correct. But then I believe, and
23 Mr. Katz will look for it while I'm speaking, that there was
24 an allegation; that there came a point in time, where they
25 erased their back office records.

1 THE COURT: In this case?

2 MR. WEXELBAUM: Yes. That's my recollection.

3 THE COURT: Was there an allegation --

4 MR. WEXELBAUM: That is my recollection.

5 THE COURT: -- (indiscernible), Ms. Cole.

6 MR. WEXELBAUM: Am I right, Ms. Cole?

7 MS. COLE: The allegation is --

8 MR. WEXELBAUM: Am (indiscernible) --

9 MS. COLE: Okay. Page 37, paragraph 111.

10 THE COURT: Let me just get there.

11 (Pause)

12 MR. WEXELBAUM: (Indiscernible) --

13 MS. COLE: And the allegation is that beginning in
14 the 2000s, BLMIS cleared the accounts of any reported
15 holding lingering in its computer system from the mid-1990s
16 when BLMIS ceased reporting fake trading.

17 So, there were still remnants from when they had
18 created them and they simply cleared them out of the --

19 MR. WEXELBAUM: My point is that the internal
20 machinations of BLMIS cannot be imputed to Mr. Green. He
21 was not given their internal records. They even allege that
22 he was not given the internal records.

23 THE COURT: No, but this is saying -- this is
24 saying that they cleared out earlier records, as I read it,
25 and, then, starting in the mid-1990s, they didn't even

1 bother to generate any records. They were just giving the
2 portfolio evaluations. That's what is says.

3 MR. WEXELBAUM: I agree. Yeah. But the
4 allegation is that in the early 2000s, they cleared out the
5 records from the mid-1990s on. It doesn't say only from the
6 mid-1990s.

7 I would assume it went up until when they started
8 clearing the account.

9 But the point is, we weren't privy to any of that.
10 They didn't give us their internal records.

11 In fact, the second amended complaint alleges that
12 they did not give --

13 THE COURT: You know, actually this just came up
14 today but I find that mind boggling that Brunner was getting
15 these statements and not sending them on to anybody but
16 money keeps getting drawn out of these accounts. I don't
17 understand how that --

18 MR. WEXELBAUM: Well, they certainly never gave
19 them to Mr. Green who wasn't involved until 1995.

20 THE COURT: Well, it seems to -- well, at least
21 his testimony was that he didn't give them to anybody,
22 right?

23 MR. WEXELBAUM: Well, that's my recollection and I
24 think Ms. Wang agrees with it.

25 THE COURT: So, if Green -- nobody's getting these

1 statements; how is it that Green is able to transfer or --
2 if I accept the allegation that he ran YHA; how is it he was
3 able to transfer \$3 million out of the account in 19 -- in
4 March of 1989 without getting any statements knowing what
5 was in the account?

6 MR. WEXELBAUM: You're asking how Green could do
7 that? Green didn't do it.

8 THE COURT: Well, but the allegation is --

9 MR. WEXELBAUM: But Mr. Igoine knew in 1983. He
10 wrote a check for \$3 million and gave it to Mr. Madoff.

11 THE COURT: But for six years, he's pulling money,
12 not a lot of money. But he's pulling money out --

13 MR. WEXELBAUM: (Indiscernible) -- but the account
14 still had more than \$3 million in it when he made that
15 transfer of I think \$2.1 (indiscernible) --

16 THE COURT: Well, it had 2.1 -- in real dollars,
17 he had \$2.1 million and he pulls \$3 million out. But how
18 does he know what he's got in the account; is my question.

19 MR. WEXELBAUM: Your Honor, I can't read
20 Mr. Igoine's mind.

21 THE COURT: Unless it doesn't matter, right?

22 MR. WEXELBAUM: It doesn't matter and I certainly
23 don't know what Mr. Igoine knew or didn't know.

24 MS. COLE: And, Your Honor, you can draw the
25 inference that other people other than Mr. Brunner were

1 getting account statements as well. That's another thought.

2 THE COURT: I don't know how I could draw that
3 inference. The only account statements I've seen have
4 Brunner's address on them.

5 MR. WEXELBAUM: With respect to the Premero draft
6 portfolio being divided into two --

7 THE COURT: Yes.

8 MR. WEXELBAUM: -- another point is those
9 adjustments were based on Mr. Green's real time letters for
10 the preceding period.

11 THE COURT: The argument that's being made is that
12 the back dating and creation of a Premero 2 account or
13 holdings is somehow the equivalent of knowing that no actual
14 trades took place.

15 And, so, I don't think it's on the same level as
16 knowing that fictitious trades are being created to give
17 value to somebody.

18 MR. WEXELBAUM: And especially if you look at the
19 real time letters saying, take this money and put it into
20 this Premero account.

21 THE COURT: (Indiscernible) --

22 MR. WEXELBAUM: And somebody put it into this one.
23 Take the money out of this one. Take the money out of this
24 one. These were real time letters --

25 THE COURT: So, how did he know what was in the

1 account though between those portfolio evaluations?

2 MR. WEXELBAUM: He went from the portfolio
3 evaluation to portfolio evaluation.

4 THE COURT: How did he know, though, whether --
5 when he had a reported gain or a loss, how he was going to
6 do that?

7 MR. WEXELBAUM: That was not reported to him. If
8 he was asking to withdraw money that was more than he had, I
9 would assume --

10 THE COURT: But, I mean, presumably, if Madoff
11 trading stocks or BLMIS is trading stocks, every trade is
12 going to generate a gain or a loss. I know that happens
13 with me. And you get a -- that's why I asked the question
14 about a 1099. So, if he doesn't know what trades are
15 occurring and he's, you know -- how does know --

16 MR. WEXELBAUM: My recollection --

17 THE COURT: -- (indiscernible) gains or losses for
18 tax purpose?

19 MR. WEXELBAUM: My recollection is they did issue
20 statements to Magnify, I think, for withholding taxes and
21 that sort of stuff when there were dividend payments, et
22 cetera.

23 But, again, a lot of that was just not given.

24 THE COURT: You've seen dividend payments --

25 MS. COLE: And if --

1 THE COURT: It may have been a -- supposed
2 reinvestment dividends but --

3 MS. COLE: The -- we've been talking a little bit
4 about the fee agreement. I just want to cite, Your Honor,
5 that's in paragraph 102.

6 THE COURT: 1-0-2?

7 MS. COLE: Uh-huh on page 34 that Green agreed to
8 and paid himself to set investment policy for management of
9 portfolio and safeguarding of Magnify's funds invested in
10 it, a follow up of actual implementation of investment
11 policy, examination of Magnify's earnings and supervision of
12 Magnify -- of movement in funds of Magnify's portfolio.

13 THE COURT: That sounds like just something that
14 was put in an agreement so he could siphon off some
15 management fees.

16 That may have been a breach of fiduciary duty to
17 Magnify but --

18 MS. COLE: But even -- the relevance of this is
19 not that he didn't do it. It's that he took -- now, this is
20 his subjective understanding of the kinds of things that an
21 investment manager ought to be able to do.

22 So, the question is -- the question is; can you
23 plausibly infer that, based on being handed a piece of paper
24 that says you have \$500 million out of two accounts, and
25 never receiving another scrap of information; would he have

1 believed, just like Your Honor said; hey, I usually get the
2 (indiscernible) with every trade; would he have believed
3 that this was a legitimate securities trading.

4 So, the relevance of his drafting this agreement
5 is his own statement of here's what an investment advisor
6 ought to be able to do and he couldn't have done any of it.

7 The tax issue is discussed in paragraph 1-0-4.
8 And what we say is, although BLMIS purported to make
9 deductions for payment of foreign withholding tax on certain
10 dividends for other customers, BLMIS stopped reporting to
11 Green any dividend or withholding transactions providing no
12 basis for him to know whether such transactions were even
13 occurring; stopped paying payments to the IRS on Magnify's
14 behalf and gave Green no record to assess Magnify's
15 potential tax liability.

16 And, although we haven't talked about it, one more
17 thing that the complaint alleges is in his capacity as the
18 person in control of Yeshaya, of the -- of YHA, Green was
19 aware that they received monthly customer statements.

20 We're not alleging that he was aware of a
21 particular trade --

22 THE COURT: Right.

23 MS. COLE: -- but merely that he saw they get
24 monthly statements.

25 THE COURT: Okay.

1 MR. WEXELBAUM: And Mr. Green denies that. He was
2 not privy to those statements.

3 But with respect to the fee agreement --

4 THE COURT: That's when we get back to Green's
5 denials of some of the allegations that's appropriate for
6 trial.

7 MR. WEXELBAUM: With respect to the fee agreement
8 and the alleged breach of fiduciary duty and all of the
9 other allegations of wrongdoing by Mr. Green, Your Honor has
10 repeatedly held that greed, dishonesty, misappropriation of
11 monies does not infer actual knowledge that BLMIS was not
12 actually trading securities.

13 THE COURT: Well, that's (indiscernible) Madoff to
14 look the other way. That's not --

15 MR. WEXELBAUM: It doesn't provide actual
16 knowledge, Your Honor.

17 THE COURT: Well -- okay. Thank you. I'll
18 reserve decision.

19 MS. COLE: Thank you, Your Honor.

20 (Whereupon, these proceedings were concluded at 11:50
21 A.M.)

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24

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C E R T I F I C A T I O N

We, Nicole Yawn, Jamie Gallagher, and Penny Skaw, certify
that the foregoing transcript is a true and accurate record
of the proceedings.

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